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No. 82-327

In the Supreme Court of the United States

OCTOBER TERM, 1982

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

and

THE OPTIONS CLEARING CORPORATION,
Petitioners,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM OF THE CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED AND THE OPTIONS CLEARING CORPORATION SUGGESTING MOOTNESS

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The decisions below of the United States Court of Appeals for the Seventh Circuit set aside orders of the Securities and Exchange Commission ("SEC") that had approved the rules of the Chicago Board Options Exchange, Incorporated ("CBOE") for trading options on securities guaranteed by the Government National Mortgage Association ("GNMA options") and rules of The Options Clearing Corporation ("OCC") for the issuance, clearance and settlement of GNMA options. (Pet. App. A-1 to A-99 and B-1 to B-5).[1] The decisions

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed herein by CBOE and OCC on August 25, 1982. Another petition for a writ of certiorari (No. 82-526) has been filed by the Solicitor General on behalf of the SEC to seek review of the judgments in these cases. Pursuant to Rule 28.1 of the Rules of this Court, CBOE and OCC state that they have no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

below held that (1) the issuance and trading of GNMA options were subject to the exclusive regulatory jurisdiction of the Commodity Futures Trading Commission ("CFTC") under the provisions of Section 2(a)(1) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 2, and were therefore subject to the commodity option ban set forth in Section 4c(c) of the CEA, 7 U.S.C. § 6c(c), (Pet. App. A-11 to A-36), and (2) the SEC had no authority under the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78a-78kk, to approve CBOE's and OCC's proposed rules because GNMA options were not "securities" (as then defined in the Exchange Act) and because the SEC's authority to regulate securities options under Section 9 of the Exchange Act, 15 U.S.C. § 78i, did not apply to options on exempted securities (Pet. App. A-37 to A-48).

These cases are now moot for two reasons. First, on October 13, 1982, the President signed a bill (Pub. L. No. 97-303, 96 Stat. 1409)[2] that effectively overrules the decisions of the Court of Appeals. *See Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (enactment of new statute mooted claims based on prior law). Under the new legislation, the definition of "security" in Section 3(a)(10) of the Exchange Act, 15 U.S.C. § 78c(a)(10), has been amended to include explicitly "any put, call, straddle, option, or privilege on any security." In addition, Section 9(f) of the Exchange Act has been amended to make the exclusion of exempted securities contained therein apply only to subsection 9(a) and not to those provisions of Section 9 which provide for SEC regulation of options transactions effected on a national securities exchange. Finally, a new Section 9(g) has been added to the Exchange Act which states in pertinent part:

> Notwithstanding any other provision of law, the Commission [SEC] shall have the authority to regulate the trading of any put, call, straddle, option, or privilege on any security . . . .

This legislation makes it clear that the SEC, and not the CFTC or any other federal agency, has the authority to regulate

[2] The text of Pub. L. No. 97-303 is reprinted in the appendix to the Memorandum for the Securities and Exchange Commission Suggesting Mootness filed by the Solicitor General in No. 82-526 on October 18, 1982.

options on all securities, including options on GNMA securities.

Second, CBOE and OCC refiled with the SEC their respective rules relating to GNMA options, and on October 14, 1982, the SEC issued a new order approving these rules under its authority as clarified by Pub. L. No. 97-303. Securities Exchange Act Release No. 19125, 47 Fed. Reg. 46,934 (1982). On October 15, 1982, the Board of Trade of the City of Chicago ("Board of Trade"), the respondent herein, filed in the United States Court of Appeals for the Seventh Circuit a petition to review this new SEC order.[3] In these circumstances, the validity of the SEC's previous orders under the law as it existed in 1981 has become an academic question that cannot affect the rights of the litigants. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

CBOE and OCC therefore respectfully submit that the petition for a writ of certiorari should be granted, the judgments of the Court of Appeals vacated, and the cases remanded with directions to dismiss the petitions for review as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).[4]

Respectfully submitted,

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[3] The Board of Trade also filed with the Court of Appeals a motion for an emergency stay, which was denied by an order dated October 21, 1982. On October 21, 1982, the Board of Trade filed an emergency motion for reconsideration *en banc* of the stay motion, and on the same day the Court of Appeals (*en banc*) denied the motion "because [Pub. L. No. 97-303] grants the [SEC] jurisdiction under the securities laws to authorize options on government securities."

[4] The memorandum filed by the Solicitor General in No. 82-526 requests the same disposition of these cases.